Supreme Court, U.S.
FILED
SEP 10 1992
OFFICE OF THE CLERK

No. 91-1594

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FRED H. EDENFIELD, *et al.*,
Petitioners,

v.

SCOTT FANE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, ASSOCIATION OF NATIONAL ADVERTISERS, INC., DIRECT MARKETING ASSOCIATION, INC. AND OLAN MILLS INC. IN SUPPORT OF RESPONDENT

Of Counsel:

DAVID PHILLIPS
General Counsel
OLAN MILLS, INC.
4325 Amnicola Highway
P.O. Box 23456
Chattanooga, Tenn. 37422

WALLACE S. SNYDER
President
JEFFREY L. PERLMAN
Vice President,
Government Affairs
AMERICAN ADVERTISING FEDERATION
1400 K Street, N.W.
Washington, D.C. 20005

RICHARD E. WILEY
Counsel of Record
THOMAS W. KIRBY
JAMES T. BRUCE
HOWARD H. BELL
DANIEL E. TROY
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for Amici Curiae

[Additional Counsel Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

37pp

GILBERT H. WEIL
ASSOCIATION OF NATIONAL ADVERTISERS, INC.
60 East 42nd Street
New York, N.Y. 10165

ROBERT J. LEVERING
Senior Vice President
DIRECT MARKETING ASSOCIATION, INC.
1101 17th Street, N.W.
Washington, D.C. 20036

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE BAN ON ORAL COLD-CALL SOLICITATION BY ACCOUNTANTS DOES NOT SATISFY THE *CENTRAL HUDSON* TEST BECAUSE IT DOES NOT DIRECTLY ADVANCE THE STATE'S INTEREST NOR IS IT "NARROWLY TAILORED TO ACHIEVE THE DESIRED OBJECTIVE"	5
A. Outright Bans on Communication for Prophylactic Purposes Are Particularly Suspect	7
B. Florida's Speculative Justifications Do Not Withstand Any Level of First Amendment Scrutiny	10
1. The Ban Is Not Narrowly Tailored To Directly Advance the State's Interest	10
2. The State Has Failed To Demonstrate That the Benefits of Its Restriction Outweigh the Costs of the Ban	13
C. A Ban on Oral Cold-Call Solicitation by Telephone Is Especially Unjustifiable	14
II. TRUTHFUL COMMERCIAL MESSAGES ABOUT LAWFUL PRODUCTS OR SERVICES SHOULD BE ACCORDED FULL FIRST AMENDMENT PROTECTION	18
A. The Original Understanding of the First Amendment Was That Truthful Commercial Messages Are Fully Protected	19
B. The Results of This Court's "Commercial Speech" Decisions Generally Have Protected Truthful Commercial Messages	25

TABLE OF CONTENTS—Continued

	Page
C. The *Central Hudson* Balancing Test Should Be Abandoned, and Full First Amendment Protection Extended to All Truthful Speech About Lawful Products or Services	27
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page
Abrams v. United States, 250 U.S. 616 (1919)	23
Ackerly Communications, Inc. v. City of Somerville, 878 F.2d 513 (1st Cir. 1989)	28
Actmedia, Inc. v. Stroh, 830 F.2d 957 (9th Cir. 1986)	28
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	19
Barnes v. Glen Theater, Inc., 111 S. Ct. 2456 (1991)	18
Bates v. State Bar, 433 U.S. 350 (1977)	*passim*
Bigelow v. Virginia, 421 U.S. 809 (1975)	26
Board of Trustees v. Fox, 492 U.S. 469 (1989)	*passim*
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)	13, 16, 25
Butler v. Michigan, 352 U.S. 380 (1957)	16
Carey v. Population Services International, 431 U.S. 678 (1977)	25
Celotex v. Catrett, 477 U.S. 317 (1986)	10
Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)	*passim*
City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988)	27
Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980)	10
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	28
Fane v. Edenfield, 945 F.2d 1514 (11th Cir. 1991), *cert. granted*, 112 S.Ct. 2272 (1992)	9, 11
Fane v. Edenfield, No. TCA 88-4026 MMP (N.D. Fla. Sept. 13, 1991), *aff'd*, 945 F.2d 1514 (11th Cir. 1991), *cert. granted*, 112 S.Ct. 2272 (1992)	10, 11
First National Bank v. Bellotti, 435 U.S. 765 (1978)	21
Friedman v. Rogers, 440 U.S. 1 (1979)	11, 24, 25
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	25
Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981)	5, 8
Lamont v. Postmaster General, 381 U.S. 301 (1965)	13

TABLE OF AUTHORITIES—Continued

	Page
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	6
Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977)	*passim*
NAACP v. Button, 371 U.S. 415 (1963)	7
National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir.), *cert. denied*, 111 S.Ct. 146 (1990)	28
Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)	*passim*
Payne v. Tennessee, 111 S.Ct. 2597 (1991)	28
Peel v. Attorney Registration & Disciplinary Commission, 496 U.S. 91 (1990)	25
Perpich v. Department of Defense, 496 U.S. 334 (1990)	19
Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986)	27
In re R.M.J., 455 U.S. 191 (1982)	7, 8, 25
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	6
Rowan v. United States Post Office Department, 397 U.S. 728 (1970)	14
Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989)	6, 17, 18
Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988)	*passim*
Simon & Shuster, Inc. v. New York State Crime Victims Board, 112 S.Ct. 501 (1991)	19
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	7, 11, 29
Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748 (1976)	*passim*
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)	*passim*

Statutes

Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* (1988)	25
Fla. Stat. Ann. § 473.323(1)(*l*) (West 1991)	14

TABLE OF AUTHORITIES—Continued

	Page
Fla. Stat. Ann. § 501.059(3) (West 1991)	15
Fla. Stat. Ann. § 501.059(4) (West 1991)	15
U.S. Const. art. I, § 8	19

Miscellaneous

W. Blackstone, 3 *Commentaries on the Laws of England* (1768)	24
S. Botein, *Printers and the American Revolution in The Press and the American Revolution* (B. Bailyn & J. B. Hench, eds., 1980)	23
Continental Congress, Address to the Inhabitants of Quebec (1774), *reprinted in* B. Schwartz, 1 *The Bill of Rights: A Documentary History* (1971)	21
B. Franklin, *An Apology for Printers* (1731), *reprinted in* 2 *Writings of Benjamin Franklin* (1907)	23
Fed. R. Civ. P. 56(e)	10
A. Kozinski & S. Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990)	27
P. Kurland, *Posadas de Puerto Rico v. Tourism Co.*: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wonderous Pitiful," 1986 Sup. Ct. Rev. 1	27
A. Lee, *The Daily Newspaper in America* (1937)	20
Letter XVI of R.H. Lee, January 20, 1788, in *An Additional Number of Letters from the Federal Farmer to the Republican* (1962), *reprinted in Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* (Leonard Levy, ed., 1966)	21
L. Levy, *Legacy of Suppression* (1960)	22
J. Lofton, *The Press as Guardian of the First Amendment* (1980)	24
K. Middleton, *Commercial Speech in the Eighteenth Century, Newsletter to Newspapers: Eighteenth Century Journalism* (D.H. Bond & W.R. McLeod, eds., 1977)	20
Pa. Const. art. XII (1776), *quoted in* 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* (F. Thorpe ed. 1990)	21, 22

TABLE OF AUTHORITIES—Continued

	Page
15 *The Papers of Thomas Jefferson* 367 (J. Boyd ed. 1958)	22
F. Presbrey, *The History and Development of Advertising* (1929)	21
T. Riordan, *Dead Ringers*, Washington Post Magazine, Feb. 23, 1992, at 12	17
C. Rossiter, *Seedtime of the Republic* (1953)	20
A. Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849 (1989)	19
A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989)	19
A. Schlesinger, *Prelude to Independence: The Newspaper War of Britain 1764-1776* (1966)	24
B. Schwartz, 2 *The Bill of Rights: A Documentary History* (1971)	22
J. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism*	20
J. Story, *Equity Jurisprudence* (1836)	24
Telephone Advertising Consumer Rights Act, H.R. Rep. No. 317, 102nd Cong., 1st Sess. (1991)	17
Telephone Consumer Protection Act of 1991, News Release Rpt. No. DC-2092, CC Docket No. 92-90 (FCC Apr. 16, 1992)	14
I. Thomas, *History of Printing in America with a Biography of Printers, and an Account of Newspapers* (1810), *quoted in* D. Boorstin, *The Americans: The Colonial Experience* (1958)	22
J. Trenchard & T. Gordon, *Cato's Letters*, vols. 1 & 3 (1733)	20, 23
Va. Declaration of Rights art. 1, *reprinted in* H. Miller, *George Mason: Gentleman Revolutionary* (1975)	19
Virginia Gazette, May 18, 1776, *quoted in* H. Miller, *George Mason: Gentleman Revolutionary* (1975)	21
W. Walsh, *A History of Anglo-American Law* (1932)	24
L. Wroth, *The Colonial Printer* (1938)	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1594

FRED H. EDENFIELD, *et al.*,
Petitioners,
v.
SCOTT FANE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, ASSOCIATION OF NATIONAL ADVERTISERS, INC., DIRECT MARKETING ASSOCIATION, INC. AND OLAN MILLS INC. IN SUPPORT OF RESPONDENT

Florida's total ban of all oral cold-call solicitation by accountants impermissibly prohibits lawful and truthful commercial speech and is unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States. The decision of the United States Court of Appeals for the Eleventh Circuit invalidating the ban should be affirmed.[1]

---

[1] Both parties have consented to the participation of *amici* in this case pursuant to Supreme Court Rule 37, as evidenced in letters filed with the Court.

INTEREST OF AMICI CURIAE

Amici represent thousands of advertising agencies, advertisers, broadcasters, publishers, photographers, and others who participate in the telemarketing industry nationwide. They have joined in this brief to protect the right to disseminate, and the public's right to receive, truthful commercial speech about lawful products and services. *Amici*, who are described below, are the American Advertising Federation ("AAF"), the Association of National Advertisers, Inc. ("A.N.A."), the Direct Marketing Association, Inc. ("DMA"), and Olan Mills, Inc. ("Olan Mills").

- The AAF is a national trade association representing virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use almost all forms of media to advertise and communicate with consumers throughout the United States.

- The A.N.A. is the advertising industry's oldest trade association. It is exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions, and operating units, A.N.A. members market a wide array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. A.N.A. has long been committed to the advancement of commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

- The DMA, a non-profit corporation, is the oldest and largest trade association serving the vast community

of direct-to-the-consumer advertising and marketing. Its members are firms engaged in or associated with marketing goods and services through direct response methods, which includes the use of catalogs and other printed materials distributed directly to consumers. Many DMA members contact their customers via telephone.

- Olan Mills is a privately held company operating more than 900 photograph studios nationwide engaged in making family portraits. It employs about 16,000 people. The company was founded in Alabama in 1932 and originally conducted its business through the use of door-to-door solicitations. In 1948 Olan Mills began shifting to the use of telephone solicitation. The telephone line is now the spinal cord of Olan Mills' business in terms of acquiring and retaining customers. Virtually all of its hundreds of thousands of customers, many of whom deal with it repeatedly, are contacted initially through demographically targeted telephone "cold-calls."

SUMMARY OF ARGUMENT

Florida claims that "cold-call" solicitations—whether in-person or over the telephone—by certified public accountants are so inherently conducive to fraud and damaging to the public's regard for CPAs that they may be categorically banned regardless of the identity of the recipient, the truthfulness of the message, or the lawfulness of the service being offered. Significantly, Florida makes no serious effort to show that solicitations by accountants, typically directed toward business people in a business setting, threaten to invade the privacy of people in their homes. Nor does Florida claim that CPA telephone solicitations, which the recipient can end with the press of a button, are unduly intrusive.

Primarily, Florida seeks to justify this ban by relying on its authority to regulate professions within its borders. In defending the restriction, however, the state makes broad, unnecessary, and unsubstantiated contentions

about oral cold-call solicitations generally. The state goes too far; its power to govern professional speech is subject to the First Amendment.

Oral communication between two people, whether in-person or over the telephone, is constitutionally protected "speech." Truthful communications soliciting purchases of lawful goods and services remain protected speech, and attempts to restrict such speech must satisfy the four-part, multi-factor balancing test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The Eleventh Circuit correctly held that Florida's attempt to ban completely cold-call solicitations by accountants is invalid under this *Central Hudson* test. In particular, the Court of Appeals correctly found that the State has failed to demonstrate a "reasonable fit" between its purported goals of preventing fraud and overreaching by accountants and the means it has employed to achieve that goal. This lack of "fit" is even more pronounced as to telephone solicitations which: (1) can be readily terminated by the recipient; (2) lack the unique features of in-person solicitation deemed problematic by the Court in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); and (3) have been subjected to Florida's ban only by the administrative interpretation of the Florida Board of Public Accountancy (the "Board").

This Court, however, should not perpetuate the confusing *Central Hudson* balancing test, which lacks both textual and historical support. Instead, the Court should make clear that truthful speech about lawful products and services is entitled to the full measure of constitutional protection. This approach would be: (1) fully consonant with the original understanding of the First Amendment, as reflected in its text and surrounding historical circumstances; and (2) consistent with the *outcome* of every Supreme Court case involving such speech since it decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council*, 425 U.S. 748 (1976), with a single aberrant exception. The resulting

legal standard would be more faithful to the original meaning and text of the Constitution, far less confusing, more conducive to principled decision-making, and less subject to abuse.

Even if this Court disagrees with *amici* and finds this bar justified due to features unique to the accounting profession, *amici* urge the Court to reject summarily the sweeping theory of the Petitioner's brief. In particular, *amici* ask that this Court refuse Florida's invitation to make broad statements about the nature of commercial solicitation—especially via telephone—which could be seized upon by over-zealous regulators to impose wide-ranging bans on such solicitation generally.

ARGUMENT

I. THE BAN ON ORAL COLD-CALL SOLICITATION BY ACCOUNTANTS DOES NOT SATISFY THE *CENTRAL HUDSON* TEST BECAUSE IT DOES NOT DIRECTLY ADVANCE THE STATE'S INTEREST NOR IS IT "NARROWLY TAILORED TO ACHIEVE THE DESIRED OBJECTIVE."

"[T]he free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system." *Virginia Board of Pharmacy*, 425 U.S. at 765 (citations omitted). The First Amendment's free speech guarantee protects that indispensable free flow of commercial information. *Id.*; *Central Hudson*, 447 U.S. at 561-62. This constitutional protection extends to attempts to contact listeners as well. As the Court has said, "The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to reach their attention.'" *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v Cooper*, 336 U.S. 77, 87 (1949)). Similarly, the First Amendment safeguards the right of listeners to receive commercial information. *Linmark Associates, Inc. v.*

Township of Willingboro, 431 U.S. 85, 96 (1977) (restriction on speech impermissibly "prevent[ed] [people] from obtaining certain information.").[2]

First Amendment protections extend to all forms of oral communications between people, whether in person or by telephone. *See, e.g., Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989). Indeed, Florida's brief and its challenged regulations treat telephone conversations as "in person" speech.

This Court has held that, at minimum, a state seeking to restrict speech proposing a commercial transaction must prove that the restriction "*directly* advances" a "*substantial*" interest, and is "*narrowly* tailored" to achieve a reasonable "fit" between the legislature's ends and means. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (emphasis added). The Court must be persuaded that "the cost [has been] carefully calculated" and is justified. *Id.*[3]

In Part I *amici* show that, under the standards of *Central Hudson*, Florida's ban on accountant cold-calling must fall. However, in Part II *amici* urge the Court not to rest on the textually and historically unsupported *Central Hudson* test but, instead, to recognize that truthful speech about lawful products and services is entitled to full First Amendment protection.

[2] *See also, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Commercial speech is intensely concerned with the instrumental interest of hearers in receiving information that enhances the capacity for informed choice. As this Court has noted, consumer interest in commercial information "may be as keen, if not keener by far, than . . . interest in the day's most urgent political debate." *Virginia Board of Pharmacy*, 425 U.S. at 763.

[3] *Fox* is clear that the "burden of justifying its restrictions" is on the State. 492 U.S. at 480. The courts will not rely on assumptions, or even "legislative determination[s]," but will "go behind" them to assess the factual evidence. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978). Where, as here, the restriction at issue obviously tends to favor entrenched economic interests by suppressing the speech of emerging competitors, the Court should be particularly careful to assure that proffered justifications are genuine and substantial.

A. Outright Bans on Communication for Prophylatic Purposes Are Particularly Suspect.

The key requirement of the *Central Hudson* test that any governmental restriction on commercial speech directly advance a substantial interest in a narrowly tailored manner places an especially heavy burden on the state to justify a total prohibition on such speech. Yet Florida here is defending a statute and implementing regulations that absolutely forbid an accountant to speak first to a stranger (in person or by telephone) to propose CPA services. Florida's stated objection is not to accountants obtaining new clients; indeed, the ban does not forbid an accountant to seek new clients through other means, including many that carry equal or greater risk of fraud. Instead Florida objects to every form of direct speech, the so-called "cold-call solicitation," defined by its content, and subjects that speech to an absolute ban. This Court's jurisprudence makes plain that flat bans on communication are inappropriate, unless the state can demonstrate that only such a ban can achieve its substantial goals.

In a variety of contexts involving speech, the Court has said that "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone. . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted).[4] Thus, the government may not "place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in an way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982) (over-

[4] *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (holding that ordinance prohibiting door-to-door solicitation by charities failing to meet certain requirements was broader than necessary to prevent fraud).

turning Missouri's attempt to prohibit certain types of solicitation completely based on their "potentially misleading" nature). Nor may the state ban a particular mode of communication, defined entirely by content. *Linmark Associates, Inc.*, 431 U.S. at 93-95.

As *In re R.M.J.* illustrates, these principles unquestionably apply to commercial speech.[5] In fact, even "isolated abuses or mistakes cannot justify a total ban on [a] mode of protected commercial speech." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988).[6]

To overcome this robust tradition of rejecting absolute prophylactic bans on speech, Florida rests almost entirely on *Ohralik*, 436 U.S. 447—a clearly distinguishable case. *Ohralik* involved a lawyer who, despite being initially rebuffed, bullied two injured and bedridden patients into

[5] *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643 (1985) ("The state's argument that it may apply a prophylactic rule to punish appellant [for his commercial communication] notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the state's purposes."); *Virginia Board of Pharmacy*, 425 U.S. at 748 (holding unconstitutional blanket ban on drug advertising because it was more intrusive than necessary to prevent fraud and abuse); *Bates v. State Bar*, 433 U.S. 350, 384 (1977) (invalidating restriction on advertising by attorneys on grounds that other, more focused restrictions could serve state's interests).

[6] Although *Fox*, 492 U.S. 469, upheld a restriction on the sale of Tupperware in dormitories, it is perhaps best understood—and perhaps should have been analyzed—as a right of access case involving a rule of general applicability affecting many business activities in addition to commercial speech. *See International Society for Krishna Consciousness*, 452 U.S. at 654 (state fair may require that sale or distribution of any merchandise on state fair grounds be licensed). Unlike Florida's law, the general ban on most commercial activities on campuses at issue in *Fox* did not directly discriminate against certain forms of speech. Rather, its broad purpose was to keep businesses out of university campus dormitories.

allowing him to represent them. He later refused to relinquish the representation when the solicited parties tried to revoke their consent. What was "objectionable about Ohralik's behavior . . . [was] not so much that he solicited business for himself, but rather the circumstances in which he performed that solicitation and the means by which he accomplished it." *Id.* at 470 (Marshall, J., concurring in part and concurring in judgment).[7]

In addition, the *Ohralik* decision is inextricably linked to what this Court has identified as the unique status of lawyers and the heightened demands of the legal profession. *Shapero*, 486 U.S. at 476 (referring to the regulatory difficulties unique to lawyers); *see also id.* at 490 (O'Connor, J., dissenting).[8] What is true for lawyers—who are specifically trained to persuade—is not true for accountants. As the Court of Appeals said, "[s]olicitation by a CPA does not entail the 'coercive force of the personal presence of a tailored advocate.'" *Fane v. Edenfield*, 945 F.2d 1514, 1520 (11th Cir. 1991)

[7] *Ohralik* therefore establishes the unexceptionable proposition that the government may prohibit oppressive conduct that actually occurs. It does not demonstrate that the state may impose a wide-ranging prophylactic ban to guard against conduct which might perhaps take place.

[8] While some of the *amici* question the extent to which even this rationale justifies the restrictions on advertising by lawyers which this Court has upheld, the differences between accountants and their clients, on the one hand, and lawyers and their clients, on the other, mean that the Court need not face this issue. Moreover, *amici* recognize that there are disagreements among the members of this Court concerning the degree of regulation states may impose on professions and the interest that may justify such regulation. *Compare, e.g., Shapero*, 486 U.S. at 479 *with id.* at 487 (O'Connor, J., dissenting). However the Court may ultimately decide that issue, the interests of the states in regulating the practice of professions within their borders is plainly different from—and more substantial than—its interest in restricting protected communications of advertisers and marketers of generally available products and services.

(quoting *Zauderer*, 471 U.S. at 642) [hereinafter "Court of Appeals op."].[9]

The Court therefore should adhere to its tradition of rejecting prophylactic bans on speech and reject Florida's overly broad reading of *Ohralik*.

B. Florida's Speculative Justifications Do Not Withstand Any Level of First Amendment Scrutiny.

The ban is unsupportable even if this Court were to look beyond its strong presumption against flat bans on speech. Once the plaintiff moved for summary judgment, Florida was required to adduce evidence to support its undisputed prohibition of speech. Fed. R. Civ. P. 56(e); *Celotex v. Catrett*, 477 U.S. 317 (1986); *see Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest."). Florida did not offer any such evidence, and the speculative justifications that it proffered do not withstand scrutiny under *Central Hudson*. In any event, Florida has failed to prove that the bar is narrowly tailored to achieve substantial objectives or that the benefits gained, if any, justify the costs. *Fox*, 492 U.S. at 480.

1. *The Ban Is Not Narrowly Tailored To Directly Advance the State's Interest.*

Florida's ban is not defined in terms of, and is not intended to protect, any uniquely vulnerable class of recipients.[10] Instead, Florida's brief asserts that the

[9] Of course, it is absurd to assert that professionals have a special proclivity to dishonesty. This is true even of lawyers.

[10] As the District Court said, "[CPAs] prefer to solicit prosperous business people as potential clients. These people tend to be knowledgeable about financial matters and successful enough to require specialized accounting services: they know what they need and whether the accountant can fulfill this need." *Fane v. Edenfield*, No. TCA 88-4026MMP, slip op. at 7-8 (N.D. Fla. Sept. 13, 1991) [hereinafter "Dist. Ct. op."]; *see also* Court of Appeals op. at 1520. The CPA's audience is therefore often different from that of the lawyer soliciting a potential client who may well be in *extremis*, emotionally or physically. *Compare Ohralik*, 436 U.S. 447.

nature of a cold-call itself, regardless of the recipient, tends to promote "fraud, overreaching, [and] misrepresentation" in a way that only a ban can correct.[11]

None of Florida's proffered justifications establish any reason why cold-call solicitation is uniquely likely to lead to fraud. The temptations to fraud that Florida discusses are just as great if a potential customer calls the accountant in response to a flyer, television ad, or telephone book listing, or if the contact occurs in some other way. Indeed, one might suspect that the temptations are even greater when an accountant is seeking to retain an existing client, yet such speech is not forbidden. Thus, the Court of Appeals correctly observed that "[n]owhere in the record . . . do we find . . . any evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation." Court of Appeals op. at 1518.[12]

[11] Brief for Petitioner at 24, *Edenfield v. Fane*, No. 91-1594 (U.S. July 24, 1992). Significantly, the state does not seriously attempt to justify its ban here on any infringement on the privacy of the home. Nor could it, for accountants—particularly those offering to perform the "attest" function—would primarily call upon potential customers at their place of business. *See* Dist. Ct. op. at 8 ("[T]he solicitation [by an accountant] usually takes place in a business setting, a place where the potential client will not feel intimidated."). Thus, Florida's law "is not directed to the unique privacy interests of persons residing in their homes because it applies not only to door-to-door solicitation," but to all forms of oral cold-call solicitation. *Village of Schaumburg*, 444 U.S. at 638-39.

[12] Florida's ban is thus wholly different from the law upheld in *Friedman v. Rogers*, 440 U.S. 1 (1979). *Friedman* makes clear that the "falsity rationale" may only be employed to justify a limitation on commercial speech where the legislature's concerns are "not speculative or hypothetical, but were based on experience." *Id.* at 13.

While Florida asserts that oral cold-calls are ephemeral, and hence "essentially unregulatable," that is no more true for cold-calls than for other types of oral communication by accountants. Thus, this consideration also fails to justify the cold-calling ban.

Finally, Florida says that public knowledge that some accountants are seeking new business through cold-calling will create a public "perception" that will "debase" the profession's public reputation and impair its "attest" function. The state's theory is that, if the public learns that CPAs are making cold-calls, it will infer that accountants are so pressed to obtain new business that they will be willing to "bend the rules." Petition for Writ of Certiorari at 21, *Edenfield v. Fane*, No. 91-1594 (U.S. Mar. 30, 1992). The argument is wholly specious, as it rests on the belief that cold-calling signals a need for business and that a need for business signals a willingness to commit fraud. Even if that were true, the cold-calling ban does not eliminate the accountant's desire for new business.[13] Instead, by hypothesis, it prevents the public from learning the "truth" and, hence, forming an accurate judgment about the profession and the effectiveness of the state's regulation thereof. In short, this is a claim that truthful speech may be banned so that the state may deceive the public.[14]

---

[13] In light of the protectionist nature of this restriction, it is unsurprising that the only *amicus* supporting the state is the Florida Institute of Certified Public Accountants, which represents the more entrenched elements of the accounting industry.

[14] This Court has made clear that a state may not use an advertising ban to protect the ethical or performance standard of a profession. *Central Hudson*, 447 U.S. at 770. There are far more direct ways to police the accounting profession than to prohibit all oral cold-call solicitations by CPAs, good or bad. *See, e.g., Bates*, 433 U.S. at 368 (invalidating ban on advertising by lawyers despite contention that such a restriction was justified by the need to protect "the client's trust in his attorney.").

2. *The State Has Failed To Demonstrate That the Benefits of Its Restriction Outweigh the Costs of the Ban.*

In addition to the ban being insufficiently narrowly tailored, the ban's cost clearly is not "in proportion to the interest served." *Fox*, 492 U.S. at 480. For many purposes mass communications advertising is not a substitute for the direct, person-to-person conversations that are banned by the Florida law. Oral solicitation allows sellers to contact, directly and in a most efficient manner, only those consumers whom they have reason to believe are interested in their product. Direct oral communication also allows for an exchange during which the speaker can address particular concerns and questions communicated by the listener. Restricting oral cold-call solicitations therefore trenches upon the constitutional rights of both the speaker and the receiver. *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").[15]

The ban also "increas[es] the difficulty of discovering the lowest seller of acceptable ability," thereby reducing "the incentive to price competitively." *Bates*, 433 U.S. at 377 (one benefit of price advertising is that it leads to "often . . . dramatically lower" retail prices). It serves "to perpetuate the market position of established [firms]." *Id.* at 378. Thus, Florida's bar on solicitation will function as a barrier to entry that benefits those accounting firms with a strong established client base and hobbles

---

[15] The fact the Florida law permits accountants to solicit those who have indicated their consent to such a communication does not vitiate the violation of the right to receive information. "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular viewpoints." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 80 (1983) (Rehnquist, J., concurring).

those that are struggling to form such relationships. Such a blatantly anticompetitive measure provides a sorely inadequate basis for repressing constitutionally protected speech.[16]

C. A Ban On Oral Cold-Call Solicitation by Telephone Is Especially Unjustifiable.

Importantly, although Florida's legislature has chosen to ban only "in-person" solicitation, the Board has, with no apparent justification, extended that prohibition to telephone communications as well.[17] The fact that Florida's law, coupled with its implementing regulations, prohibits both in-person and telephone solicitation alike is an additional reason to find the statute and those regulations unconstitutionally over-inclusive and irrational.

[16] If endorsed by this Court, the principle underlying the ban might easily be used to justify similar restrictions on other licensed, regulated occupations not now classified as "professions."

[17] *See* Fla. Stat. Ann. § 473.323(1)(*l*) (West 1991) (making *only* "direct, *in person*, uninvited solicitation of a specific potential client" grounds for disciplinary action) (emphasis added). Of course, the Court has long held that the government may bar commercial messages addressed to an individual who has previously indicated his or her desire to be free of such appeals. *See, e.g., Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970) ("Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit"). To accommodate the interests of individuals who do not wish to be solicited, Olan Mills has, for example, instituted a "do not call" system. The name of every individual who informs an Olan Mills employee that he or she does not wish to be called is placed on a list retained by the company. That person is not contacted for at least two years. Pursuant to the Telephone Consumer Protection Act of 1991, the Federal Communications Commission is currently formulating rules to govern telemarketing and, as part of that proceeding, the FCC is considering whether to adopt such a company-specific "do-not-call" requirement. *Telephone Consumer Protection Act of 1991*, News Release Rept. No. DC-2092, CC Docket No. 92-90 (FCC Apr. 16, 1992).

Telemarketing is simply not inherently fraudulent or coercive.[18]

When applied to telephone solicitation, Florida's reliance on the restrictions on in-person communication upheld in *Ohralik* becomes even more attenuated. *Ohralik* was limited to "in-person" (436 U.S. at 449) and "face-to-face" (*id.* at 464) communication, where the potential for coercion is more substantial than in a telephone contact. Likewise, the *Shapero* case refers to the "*personal presence* of a *trained advocate*," 486 U.S. at 475 (quoting *Zauderer*, 471 U.S. at 642), who could "grasp [the consumer] by the lapels" in a "face-to-face" setting, *id.* at 479 (quoting Brief for Respondent at 20, *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 481 (1988)).[19] These cases are inapplicable to telemarketing in which the consumer's lapels are, by definition, out of reach, contracts cannot be signed, and a natural 'cooling off" period exists between the time of the "pitch" and the execution of any written agreement.

Telemarketing is therefore analogous to the targeted mailing approved in *Shapero*. Like targeted mailing, the content of telemarketing messages can be verified.[20] Also,

[18] In fact, Florida law permits telemarketers of all kinds to call consumers at home unless a consumer affirmatively requests and pays for a special designation in the phone book indicating that such person does not want to be contacted by cold-callers. Fla. Stat. Ann. § 501.059(3) & (4) (West 1991).

[19] In describing the holding of *Ohralik*, this Court said that "[the] *unique features of in-person* solicitation *by lawyers* . . . justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain." *Zauderer*, 471 U.S. at 641 (emphasis added).

[20] To be sure, policing solicitation via telephone might be marginally more difficult for the state than detecting improprieties in written advertisements. But, as the Court has said, its decisions "involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to

at any point that the recipient of an unwanted call feels unreasonably pressured, he or she can easily terminate the conversation.[21] Expecting business-persons uninterested in a soliciting accountant's services to hang up the phone is "an acceptable burden, at least as far as the Constitution is concerned." *Youngs Drug Products Corp.*, 463 U.S. at 72 (quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y. 1967)). Recipients of unwanted calls, like the readers of unsolicited advertisements, can "effectively avoid further bombardment of their sensibilities" by a means as simple as "averting their eyes." *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). For this reason the Court in *Youngs Drug Products Corp.*, 463 U.S. at 62, 75, extended constitutional protection to unsolicited non-face-to-face communications, even where the recipient "has no commercial interest" in them. *See id.* at 75 (invalidating a statute prohibiting the mailing of unsolicited ads for contraceptives).

Anyone who owns a phone in today's society knows how to hang up on unwanted callers. Each telephone has a button or lever to serve that purpose. Florida's unsubstantiated characterization of the potential for fraud or coercion in a cold-call by an accountant provides no basis for its sweeping ban of all oral unsolicited communications by a particular speaker, whether via the telephone or in person.[22]

---

justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646.

[21] In addition, tens of millions of Americans have telephone answering machines with which they can prescreen calls before taking or returning them. Also, in the office, many potential clients of accountants have secretaries who perform this screening function.

[22] As this Court has colorfully put it, the effect of this statute is "to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Moreover, as Congress has recognized, the "[u]se of the telephone to market property, goods and services directly to business customers, as well as to individual consumers is not only a common practice, but also a high growth industry." [23] Telemarketing plays an increasingly important role in providing information about goods and services to the public, as well as the goods and services themselves. Telemarketing also represents an efficient way to provide many goods and services at low cost, on convenient terms and conditions. It is also especially appropriate to the sale of certain types of products and services.[24] Moreover, telemarketing enables new practitioners and start-up businesses to begin to compete at a very low cost; telemarketing thus lowers barriers to entry generally and increases competition.

Notwithstanding these clear benefits of telemarketing, the state has chosen to bar telemarketing along with direct, in-person solicitation by accountants. It has made this decision without legislative or administrative findings, without credible evidence that telemarketing solicitation by accountants places unreasonable pressures on customers, and without determining that existing consumer protection laws do not adequately protect buyers of such services. There were not even the "conclusory statements" found inadequate in *Sable Communications*,

---

[23] Telephone Advertising Consumer Rights Act, H.R. Rep. No. 317, 102nd Cong., 1st Sess. (1991). To illustrate, the dollar value of telemarketing sales has grown from just over $80 million in 1984 to roughly $430 billion in 1990. *Id.* at 7. Currently there are 3.5 million people actively engaged in telemarketing, and it is estimated that by the year 2000, eight million people will be engaged in telesales. T. Riordan, *Dead Ringers*, Washington Post Magazine, Feb. 23, 1992, at 12.

[24] By way of example, Olan Mills has found through years of experience that for its line of business—family portraits—there is no substitute for the telephone as a marketing tool. Family portraits are not a product that can be purchased at the spur of the moment at a mall. Only with a telephone can a marketer set an appointment for the family to assemble, scrubbed and dressed, at the local studio.

Inc., 492 U.S. at 129, or the "isolated abuses or mistakes" found insufficient in *Shapero*. Florida's bar on all oral cold-call solicitations by accountants—and especially on such solicitation via telephone—is consequently invalid.[25]

II. TRUTHFUL COMMERCIAL MESSAGES ABOUT LAWFUL PRODUCTS OR SERVICES SHOULD BE ACCORDED FULL FIRST AMENDMENT PROTECTION.

While this Court could simply affirm on the basis of its traditional disapproval of broad prophylactic bans on speech under *Central Hudson's* four-part balancing test, a better approach would be for the Court to hold that truthful commercial speech is entitled to the full protection of the First Amendment.[26] Such a holding would be in accord with the original understanding of the First Amendment and with the *results* of virtually all of this Court's commercial speech cases.[27] Moreover, it would

[25] Florida's attempt to characterize its regulation as a content-neutral time, place and manner restriction cannot save the ban. "The time, place or manner test was developed for evaluating restrictions on public property which had been dedicated as a public forum." *Barnes v. Glen Theater, Inc.*, 111 S.Ct. 2456, 2460 (1991) (citations and quotation marks omitted). Here the communication is entirely private. Nor is the state's restriction content neutral; it prohibits only one subject and category of speech (oral solicitation by accountants about their services) based on the content of the message sought to be conveyed. Moreover, the Court has explicitly rejected an attempt to style a similar prohibition as a permissible time, place, and manner restriction. *See Linmark Assocs. Inc.*, 431 U.S. at 94.

[26] Many of the *amici* who are submitting this brief made this argument at somewhat greater length in a case also under consideration by the Court this term. *See* Brief *Amici Curiae* of American Advertising Federation, American Ass'n of Advertising Agencies, Direct Marketing Ass'n, The Media Institute, and National Ass'n of Broadcasters in Support of Respondents at 24-28, *City of Cincinnati v. Discovery Network, Inc.*, No. 91-1200 (U.S. June 1, 1992).

[27] Whether or not one believes that the text and history of the Constitution determine the outcome of a particular case, the original understanding of the Constitution's terms is without question *relevant* to any attempt to interpret the Constitution. *See, e.g., Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting); *Perpich v. Department of Defense*, 110 S. Ct. 2418, 2422-23 (1990).

eliminate a complex multi-factor balancing test that is undesirable in design and has proved confusing and unpredictable in application.[28]

A. The Original Understanding of the First Amendment Was That Truthful Commercial Messages Are Fully Protected.

While school civics courses tend to present the founding fathers primarily as a group of political philosophers, they were also intensely practical businessmen and farmers. In the text of the Constitution itself, even before there was a bill of rights, they took care to authorize patents and copyrights "To promote the Progress of Science and *useful* Arts." U.S. Const. art. I, § 8 (emphasis added). This practical focus on the "useful" manifests their concern with business and mercantile affairs and, correspondingly, with property rights, which they accorded the same status as other liberties.[29] They accepted the importance of freedom of expression and its

[28] Such standards have been criticized as inherently confusing and tending to invite judges to "mistake their own predilections for the law." A. Scalia, *Orginalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 863 (1989); *see also* A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989). Especially in the First Amendment area, where uncertainty leads to chilling and self-censorship, such balancing tests are undesirable. *Simon & Shuster, Inc. v. New York State Crime Victims Board*, 112 S.Ct. 501, 514 (1991) (Kennedy, J., concurring).

[29] For example, George Mason's Virginia Declaration of Rights stated that the purpose of the Revolution was to secure "the Enjoyment of Life and Liberty, *with the Means of acquiring and possessing Property*, and pursuing Happiness and Safety." Va. Declaration of Rights, art. 1, *reprinted in* H. Miller, *George Mason: Gentleman Revolutionary* 340 (1975) (emphasis added).

inextricable link with property rights, which Cato had articulated as follows: "This sacred Privilege is so essential to free Government that the Security of Property, and the Freedom of Speech, always go together." J. Trenchard & T. Gordon, 1 *Cato's Letters* 95-103 (1733) (Essay No. 15, Of Freedom of Speech: That the Same is Inseparable From Publick Liberty, February 4, 1720).[30] Given their outlook, the current distinction between so-called "commercial speech" and speech about other matters would never have occurred to the Framers' generation.

This practical concern for business and property was mirrored in the vibrant colonial press. The standard colonial newspaper was almost half-filled with local advertising. L. Wroth, *The Colonial Printer* 234 (1938). To illustrate, in 1766 Hugh Gaine's *New York Mercury* was 70% advertising, and 55% of the *Royal Gazette* was commercial matter. A. Lee, *The Daily Newspaper in America* 32 (1937).[31] For much of that era, the newspapers did not use layout, typeface, or similar techniques to differentiate commercial and editorial matter. Middleton, supra, at 281. "Advertisements had as much

[30] The libertarian *Cato's Letters*, published from 1720-1724 and widely circulated in the colonies, were "the most popular, quotable, esteemed source of political ideas in the colonial period." C. Rossiter, *Seedtime of the Republic* 141 (1953). In particular, Cato's articulation of the tie between property rights and free speech was enormously influential in colonial America. J. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (1988).

[31] The majority of the ads which appeared in colonial newspapers would today be considered "commercial speech." K. Middleton, Commercial Speech in the Eighteenth Century, *Newsletters to Newspapers: Eighteenth Century Journalism* 277 (D.H. Bond & W.R. McLeod, eds., 1977) ("The colonial press regularly carried reputable medical ads, as well as those for books, cloth, empty bottles, corks, and other useful goods and services."). Without these ads, the colonial press so important to the Revolutionary cause would not have existed. During the Eighteenth Century, like today, "[a]dvertising represented the chief profit margin in the newspaper business." *Id.* at 56.

interest as the news columns, perhaps greater interest . . . . Arrival of a new cargo . . . likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe." F. Presbrey, *The History and Development of Advertising* 154 (1929).

The full integration of editorial and commercial matters in the press reflected the colonial view that the benefits of freedom of expression extended to the entire spectrum of human endeavors. For example, among the reasons given by the Continental Congress to settlers in Quebec for the importance of a free press was "the advancement of truth, science, morality, and arts in general." Address to the Inhabitants of Quebec (1744), *reprinted in* B. Schwartz, 1 *The Bill of Rights: A Documentary History* 223 (1971). This view encompassed commercial communications as well. For example, Richard Henry Lee of Virginia—perhaps the leading Anti-Federalist—said in his demand for a bill of rights that "a free press is the channel of communication to *mercantile* and public affairs. . . ." Letter XVI of R.H. Lee, January 20, 1788, in *An Additional number of Letters from the Federal Farmer to the Republican* 151-53 (1962) (emphasis added), *reprinted in Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* 144 (Leonard Levy, ed., 1966).[32]

[32] The twin concepts of freedom of speech and of the press were considered as two sides of the same coin, serving the same purposes, and were often referred to interchangeably. As the Virginia Gazette said on May 18, 1776, "The *use of speech* is a *natural right* . . . [and] [p]rinting is a more extensive and improved kind of speech," *quoted in* Miller, *supra*, at 148 (emphasis in original). Thus, this Court has treated the freedom of speech and press as coterminous. *See, e.g., First National Bank v. Bellotti*, 435 U.S. 765, 781-83 (1978).

The constitutions of the several states reveal the interchangeable nature of the terms to describe the identical set of rights. For example, Pennsylvania's 1776 Declaration of Rights stated: "That

Thus, the generation of the Framers understood the value of commercial messages. As the prominent printer-historian Isaiah Thomas, editor of a "violently pro-Revolutionary" newspaper, wrote:

> [Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.

History of Printing in America with a Biography of Printers, and an Account of Newspapers (1810), *quoted in* D. Boorstin, *The Americans: The Colonial Experience* 328, 415 (1958).

Given the prevalence and importance of commercial messages in colonial America, it is not surprising that the very idea of "the freedom of speech, or of the press" evolved in close connection with the development of advertising. In fact, one of the best-known statements in

---

the people have a right to *freedom of speech*, and of writing, and publishing their sentiments; therefore *the freedom of the press* ought not to be restrained." Pa. Const. art. XII (1776), *quoted in* 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3083 (F. Thorpe, ed., 1909) (emphasis added). *See also* B. Schwartz, 2 *The Bill of Rights: A Documentary History* 658 (1971) (reporting proposed Bill of Rights adopted at the Pennsylvania ratifying convention of 1787, using almost identical language).

Tellingly, Thomas Jefferson's proposed modification to Madison's initial draft of the First Amendment provided that "[t]he people shall not be deprived or abridged of their right to *speak, to write,* or *otherwise* to publish anything but false facts . . . ." 15 *The Papers of Thomas Jefferson* 367 (J. Boyd ed. 1958) (emphasis added). *See also* L. Levy, *Legacy of Suppression* 174 (1960) ("[F]reedom of speech and freedom of the press, being subject to the same restraints of subsequent punishment were rarely distinguished. Most writers, including Addison, Cato, and Alexander, who employed the term 'freedom of speech' with great frequency, used it synonymously with freedom of the press.").

defense of the freedom of expression was written in response to an attack on a commercial message printed by Benjamin Franklin. In 1731, Franklin printed an advertising notice for a ship's captain. The ad was not part of a newspaper; it was distributed as a stand-alone commercial handbill. The paper simply "propose[d] a commercial transaction," *Virginia Board of Pharmacy*, 425 U.S. at 760 (quoting *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975)), by seeking additional freight and passengers for the captain's ship. At the bottom of the ad was the note "No Sea Hens nor Black Gowns will be admitted on any Terms." *An Apology for Printers*, The Pennsylvania Gazette, June 10, 1731, *reprinted in* 2 *Writings of Benjamin Franklin* 172, 176 (1907).

This handbill outraged the local clergy (the "Black Gowns"), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute ("Sea Hens"). In response to attacks on the ad, Benjamin Franklin published his *Apology for Printers* which, at that time, was "[b]y far the best known and most sustained colonial argument for an impartial press." S. Botein, *Printers and the American Revolution in The Press and the American Revolution* 20 (B. Bailyn & J. B. Hench, eds., 1980). Franklin's *Apology* contended that "Printers are educated in the Belief that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick." *An Apology for Printers, reprinted in* 2 *Writings of Benjamin Franklin* at 174.[33] This incident illustrates that, at least to Franklin, the "Opinions" stated

---

[33] This echoed the sentiment in *Cato's Letters*, that "Whilst all Opinions are equally indulged, and all Parties equally allowed to speak their Minds, the Truth will come out." J. Trenchard & T. Gordon, 3 *Cato's Letters* 295 (1733). *Compare Abrams v. United States*, 250 U.S. 616, 630 (1919) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market") (Holmes, J., dissenting).

even in advertisements should be "heard by the Publick." Thus, America's first sustained defense of freedom of expression, and of the very notion of a "marketplace of ideas," came in response to an attack on commercial speech.[34]

The First Amendment sprang from this background. Its authors were accustomed to the idea that commercial speech had important practical value. Their regard for free expression had been critically shaped by Franklin's defense of a commercial handbill. Thus, when the First Amendment provided categorical protection for freedom of expression without any halfway house for commercial speech, it must be understood to have meant what it said and to have extended its full protection to truthful commercial discourse.[35]

---

[34] In addition, one of the major precipitating events of the American Revolution also involved a defense of commercial messages. The Stamp Act of 1765 taxed each newspaper—and imposed an additional two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. J. Lofton, *The Press as Guardian of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act of 1765 was in large part, if not primarily, based on their concern that it encroached on the freedom of expression. A. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1966).

[35] Of course, the government may ban the dissemination of false or misleading commercial messages. *See, e.g., Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979). This may be true either because, by definition, such messages are excluded from the First Amendment or because the government is always presumed to have a compelling interest in preventing deception. In any event, such a view comports with the original understanding of the First Amendment, which was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation. *See* W. Blackstone, 3 *Commentaries on the Laws of England* 431 (1768); J. Story, *Equity Jurisprudence* §§ 191, 192 (1836); W. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of action of deceit from mid-fourteenth century). The government may therefore police the veracity of commercial speech, whereas its ability to regulate "false" or misleading political speech, for example, is far more constrained. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("under the First Amendment there is no such thing as a false idea"). Accordingly, regulation of false or misleading speech under laws such as the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* (1988), are not unconstitutional.

B. The Results of This Court's "Commercial Speech" Decisions Generally Have Protected Truthful Commercial Messages.

As the discussion in Part I illustrates, this Court's commercial speech decisions since *Virginia Board of Pharmacy* have generally upheld restrictions which ostensibly prevented consumers from being misled—while striking down numerous regulations on commercial communications which were designed to advance other purported governmental interests.[36]

---

[36] *See, e.g., Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990) (overturning censure of an attorney and reaffirming Court's commitment to "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information.") (Stevens, J., plurality op.); *Shapero*, 486 U.S. at 479-80 (truthful, non-deceptive letters sent to individuals known to face particular legal problems were constitutionally protected); *Zauderer*, 471 U.S. at 651 (approving a requirement that attorneys inform the public that they may be responsible for costs, if not legal fees, if they hire a lawyer on a contingent fee basis because it was "reasonably related to the state's interest in preventing deception of consumers"); *Youngs Drug Products Corp.*, 463 U.S. at 80 (striking down ban on truthful unsolicited advertisements); *In re R.M.J.*, 455 U.S. at 191 (rule limiting dissemination of truthful advertising violated First Amendment); *Central Hudson*, 447 U.S. at 571-72 (regulation restricting non-deceptive advertisements promoting use of electricity violated First Amendment); *Friedman*, 440 U.S. at 13 (upholding ban on the use of trade names by optometric offices on the ground that "there is a significant possibility that trade names will be used to mislead the public"); *Bates*, 433 U.S. at 384 (truthful attorney advertising constitutionally protected); *Carey v. Population Servs. Int'l.*, 431 U.S. 678, 701-02 (1977) (law restricting advertising of contraceptives violated First

Such a rule does not deny "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech." *Ohralik*, 436 U.S. at 455-56 (quoting *Virginia Board of Pharmacy*, 423 U.S. at 771 n.24). Rather it respects the distinction, embedded in the common law, which permits broader regulation of the content of advertising to ensure its veracity. *See supra* note 35. Such regulations, however, are subject to review by the courts to ensure that the government is not using its police power to define commercial fraud and misrepresentation as a pretext to punish or censor truthful and lawful (protected) communications.[37] And the First Amendment certainly prohibits a restriction on speech which serves no purpose other than as a barrier to entry.

Although the Court functionally has accorded truthful speech about lawful products and services the full protection of the First Amendment, the Court has departed from this approach when explaining its actions and has adhered to the four-part *Central Hudson* test. As demonstrated above, however, there is no textual or historical justification for the *Central Hudson* test itself. This Court was correct in *Virginia Board of Pharmacy* when it extended First Amendment protection to "concededly truthful information about entirely lawful activity." 425 U.S. at 773. The *Central Hudson* test, which was developed later, has led at times to results that are clearly in-

Amendment since it did more than limit misleading or deceptive speech); *Linmark Assocs., Inc.*, 431 U.S. at 98 (ordinance prohibiting "for sale" signs violated First Amendment because it inhibits free flow of truthful information); *Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975) (editor could not be prosecuted for running non-deceptive advertisement for a legal service).

[37] Even the ban on in-person solicitation by lawyers upheld in *Ohralik*, 436 U.S. 447, was found to be constitutional because it prevented attorneys from taking commercial advantage of prospective clients who may be mislead or deceived in the proposed transaction.

consistent with the spirit of *Virginia Board of Pharmacy* itself.[38]

C. The *Central Hudson* Balancing Test Should Be Abandoned, and Full First Amendment Protection Extended to All Truthful Speech About Lawful Products or Services.

Despite the importance of *stare decisis*, this Court should abandon *Central Hudson*'s multi-factor balancing test and, instead, implement the original understanding of the First Amendment to protect truthful speech about

[38] Most significantly, in *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), the Court upheld Puerto Rico's restriction on advertising of casino gambling aimed at residents of Puerto Rico. Applying *Central Hudson*, the Court concluded that Puerto Rico's "substantial" interest in "reduc[ing] . . . demand for casino gambling by the residents of Puerto Rico" was "directly advance[d]" by limiting the availability of such advertising to the inhabitants of Puerto Rico. *Id.* at 341. A major flaw with this approach is that it can be employed by proponents of regulation in an effort to justify restrictions on commercial messages about any product which *could be* banned by Congress or state legislatures. In addition, an important purpose of the law upheld in *Posadas* was to protect a vulnerable population, *see id.*—a feature entirely absent here. *See supra* note 10 and accompanying text.

Moreover, the Court attempted to buttress its opinion in *Posadas* by contending that the "greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling," *id.* at 345-46, an argument which has been widely criticized. *See, e.g.*, A. Kozinski & S. Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990); P. Kurland, *Posadas de Puerto Rico v. Tourism Co.: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wonderous Pitiful"*, 1986 Sup. Ct. Rev. 1. It was also repudiated in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762-63 (1988) ("[T]hat ['greater-includes-the-lesser'] syllogism is blind to the radically different constitutional harms inherent in the 'greater' and 'lesser' restrictions. . . . [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.") (footnote omitted).

lawful products or services. Such a step is appropriate because:

- Interpretation of the First Amendment is a constitutional matter as to which Congress' legislative powers provide no ready corrective;
- Given the results of the Court's application of the *Central Hudson* test, this approach would not require substantial modification of previously approved government policies or of this Court's jurisprudence;
- Extensive reliance on the *Central Hudson* test is unlikely to have occurred;[39] and
- The lower courts have experienced serious difficulty in applying the *Central Hudson*'s complex multi-factor balancing test in a consistent and principled way.[40]

The Court thus can and should conform its jurisprudence to the original understanding of the First Amendment. Were it to do so, Florida's ban clearly would be unconstitutional because, inevitably, a blanket ban on all oral cold-call solicitation by accountants limits the ability of CPAs to communicate in a truthful, non-coercive manner about the services they can provide. *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). This impermissibly fails to differentiate the fully protected from the unprotected, the "truthful from the false, the helpful from the misleading, and the harmless from the harmful."

---

[39] *Payne v. Tennessee*, 111 S.Ct. 2597, 2609-10 (1991).

[40] *Compare, e.g., Actmedia, Inc. v. Stroh*, 830 F.2d 957, 967-68 (9th Cir. 1986) (state law prohibiting placement of alcohol advertising signs on shopping carts constitutional) *with National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 556 (2d Cir.) (certain ordinances prohibiting maintenance of off-premises signs unconstitutional), *cert. denied*, 111 S.Ct. 146 (1990); *Ackerly Communications, Inc. v. City of Somerville*, 878 F.2d 513, 522 (1st Cir. 1989) (ordinance prohibiting maintenance of off-premises sign boards unconstitutional).

Zauderer, 471 U.S. at 646.[41] Accordingly, the Court should affirm the judgment below.

CONCLUSION

For the reasons set forth herein, *amici* respectfully request that this Court affirm the decision of the Court of Appeals for the Eleventh Circuit striking down Florida's ban on oral cold-call solicitation by accountants as violative of the First Amendment.

Respectfully submitted,

Dated: Washington, D.C.
September 14, 1992

Of Counsel:

DAVID PHILLIPS
General Counsel
OLAN MILLS, INC.
4325 Amnicola Highway
P.O. Box 23456
Chattanooga, Tenn. 37422

WALLACE S. SNYDER
President
JEFFREY L. PERLMAN
Vice President,
Government Affairs
AMERICAN ADVERTISING
FEDERATION
1400 K Street, N.W.
Washington, D.C. 20005

GILBERT H. WEIL
ASSOCIATION OF NATIONAL ADVERTISERS, INC.
60 East 42nd Street
New York, N.Y. 10165

ROBERT J. LEVERING
Senior Vice President
DIRECT MARKETING ASSOCIATION, INC.
1101 17th Street, N.W.
Washington, D.C. 20036

RICHARD E. WILEY
Counsel of Record
THOMAS W. KIRBY
JAMES T. BRUCE
HOWARD H. BELL
DANIEL E. TROY
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for Amici Curiae

---

[41] Instead, the state must proceed "by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Village of Schaumberg*, 444 U.S. at 637.